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### Recommended Citation

Michael J. Gerhardt, *Impeachment Defanged and Other Institutional Ramifications of the Clinton Scandals*, 60 Md. L. Rev. 59 (2001)  
Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol60/iss1/8>

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# IMPEACHMENT DEFANGED AND OTHER INSTITUTIONAL RAMIFICATIONS OF THE CLINTON SCANDALS

MICHAEL J. GERHARDT\*

## INTRODUCTION

It would be an understatement to say that over the past year we have heard a lot about "Clinton fatigue" and the scandals of the Clinton presidency. So, it is fitting that one important purpose of this Symposium is to explore the ramifications of the so-called Clinton scandals for the person whose inauguration as president the nation will celebrate in January 2001.<sup>1</sup>

I refer to the scandals of the Clinton presidency as "so-called" because one could suggest, as some political scientists have, that a significant portion of the rhetoric about the scandal-ridden Clinton presidency is hyperbole designed primarily for the purpose of tainting the political opposition.<sup>2</sup> It is not inconceivable that much of the rhetoric during the 2000 presidential election about the criminality of both Bill Clinton and his Vice President was designed to make the electorate think that there must have been more than a little fire—or perhaps a raging conflagration—of corruption to explain all the smoke allegedly coming from the Clinton administration. In this Article, I will not question the veracity of such rhetoric. Instead, I will assume the rhetoric's veracity for the sake of clarifying the institutional effects of the congressional and legal actions taken in response to it. Of particular concern to me are the ramifications of the most dramatic response to President Clinton's misconduct—the impeachment proceedings brought against him in 1998-99. My purpose in

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1. Eds.—The final edit on this Article was completed on November 18, 2000, when the election remained "too close to call."

2. See, e.g., Paul J. Quirk, *Scandal Time: The Clinton Impeachment and the Distraction of American Politics*, in *THE CLINTON SCANDAL AND THE FUTURE OF AMERICAN GOVERNMENT* 119, 131 (Mark J. Rozell & Clyde Wilcox eds., 2000) (arguing that "[v]ery conservative Republican members of Congress . . . with highly ideological core constituencies . . . have little or no concern about maintaining mutual trust with Clinton," and that "[i]f a possible scandal seems to provide even a remote opportunity to punish [him] . . . they will seize upon that strategy and give it up very reluctantly").

adopting this focus is to clarify the status of the Clinton impeachment proceedings as a reflection of (indeed, the culmination of) a phenomenon that predated the Clinton presidency. The phenomenon is the increasing tendency of politicians (and their allies) to use media revelations, congressional investigations, and judicial proceedings to defeat their opposition. This phenomenon will surely challenge the next president, as well as other institutions that have had stakes in the revelation, investigation, and condemnation of presidential misconduct. Indeed, the controversy over the legitimacy of the outcome of the 2000 presidential election will undoubtedly intensify this phenomenon for the next president and these institutions, which include the Supreme Court, the Congress, the presidency, the media, and even my own profession of legal academics.

Part I of this Article examines the cumulative effect of several Supreme Court opinions that have made it harder for a president to shield himself from congressional and judicial inquiries into his private misconduct. The conventional wisdom is that these decisions have weakened the presidency vis-à-vis the other branches. In my view, these decisions are harmful to a president to the extent that he fights them. I use several historical examples to demonstrate that a president who puts his integrity on the line has nothing to fear—and, in fact, might have much to gain—from these decisions.

Part II examines the likely ramifications of Clinton's impeachment and trial for the impeachment process itself.<sup>3</sup> First, I challenge the conventional wisdom that the Clinton impeachment proceedings might have weakened the presidency. I contend that the proceedings are more likely to have strengthened the presidency, because members of Congress are unlikely to pursue similar charges against a president ever again. Future members of Congress almost certainly will grant presidents a much wider zone of immunity for any personal misconduct than did the Republican Congress in 1998-99. Next, I discuss whether the Clinton impeachment can help explain whether presidential and judicial impeachments should be conducted under different standards. Moreover, I find that the Clinton impeachment proceedings likely underscore the ultimate ineffectiveness of im-

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3. Impeachment, of course, has two possible meanings. It may refer to the unique power of the House of Representatives to impeach certain high-ranking officials, including the president. See U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives . . . shall have the sole Power of Impeachment."). It may also be used to refer generally to the formal process by which the Senate considers the removal of a president. See *id.* § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments. . . . [A]nd no Person shall be convicted without the Concurrence of two thirds of the Members present."). The meaning I attribute to the term will depend on the context in which I use it.

peachment—thus, the defanging of impeachment—as a response to serious presidential misconduct. For a president who does something truly and almost universally regarded as a legitimately impeachable offense, impeachment will no longer be the likely remedy. It is too cumbersome and antiquated—particularly in the age of the Internet and the twenty-four-hour news cycle, when information, images, innuendo, and rumors of scandal spread instantaneously. Once informed about a severe abuse of power by a president, the American people are unlikely to be patient. Just as they were impatient to have the impeachment proceedings against President Clinton end quickly because they believed he had not done anything that justified his removal from office, the American people are likely to be equally impatient with a chief executive's refusal to fall on his sword once he has done something that most people view as beyond the pale. A president's loss of substantial support from the public and congressional leaders is likely to produce inescapable pressure for him to resign. Precisely such a dynamic led to Richard Nixon's resignation.

Part III examines four other possible alternatives to impeachment for presidential misconduct. First, I consider the feasibility of prosecuting a sitting president and conclude that there may be practical, but not constitutional, reasons foreclosing it. Second, I discuss the feasibility of censure in the aftermath of the Clinton impeachment proceedings. I suggest that the Clinton proceedings have not foreclosed the possibility of censure in a future case, particularly because such action is consistent with constitutional text, structure, and practice. Third, I argue that the electoral process may be an alternative to impeachment since the outcome of the 2000 presidential election may be treated as vindication by one side or the other in the Clinton impeachment proceedings. Finally, I explore the costs—to democracy, the legislative process, and innocent persons—resulting from the increased use of media revelations, congressional inquiries, and judicial proceedings to impede political foes. I encourage the next president to take the lead in denouncing this trend, while members of Congress should agree, at the very least, to have bipartisan support before authorizing congressional subpoenas or investigations.

Part IV critiques the media's coverage of the Clinton scandals. I criticize both the media's disturbing penchant for using scandal or drama to build or maintain high ratings, and the related practice of promoting conflicts and featuring speculation or commentary at least as much as the conventional reporting of facts. One possible solution to this problem is for each news organization to declare publicly its standards for publication or to broadcast and demonstrate its compli-

ance with such standards. Major news organizations can also keep each other honest by covering the abilities of competing news organizations to fulfill their respective standards of publication or broadcasting.

Finally, Part V addresses a disturbing trend in academic commentary that has been exacerbated by the Clinton impeachment proceedings. The impeachment hearings provided unprecedented opportunities for law professors to gain notoriety as public intellectuals. But, in these roles, many law professors indulged the media's penchant for scandal, speculation, and conflict. In the absence of any norms within legal academia to guide or constrain such commentary in the media, many academicians acted more as advocates than as dispassionate commentators; some of them used the hearings as their first or primary opportunity to opine on the federal impeachment process and (not coincidentally) gained notoriety in the process. Through such commentary, many law professors helped to weaken the credibility of their enterprise (as a nonpartisan venture) and coarsen, rather than elevate, constitutional discourse. In the future, the challenge for law professors will be to internalize standards of public conduct and discourse. To encourage such internalization, I suggest that law faculties adopt shaming penalties to discourage self-promotion and bush-league commentary. In addition, I encourage law reviews and other publishers of legal commentary to exercise greater checks on the quality and tone of academic discourse.

## I. THE CLINTON SCANDALS AND THE FEDERAL COURTS

The conventional wisdom is that in a series of decisions on the special privileges and immunities available to presidents, the federal courts have weakened the institution of the presidency.<sup>4</sup> First, in *United States v. Nixon*,<sup>5</sup> the Supreme Court held that a president is not entitled to an absolute executive privilege to withhold information that he unilaterally prefers to keep confidential from the other

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4. See, e.g., Akhil Reed Amar, *The Unimperial Presidency*, NEW REPUBLIC, Mar. 8, 1999, at 25, 25 (arguing that "the legal precedents sprouting from the Clinton scandals have done considerable damage to the presidency, leaving us with an office weaker in key respects than the one that the Founders envisioned"); Adam Clymer, *The Presidency Is Still There, Not Quite the Same*, N.Y. TIMES, Feb. 14, 1999, § 4, at 1 (discussing the recent decisions of the Supreme Court and concluding that "the Presidency is a weaker office today than it was on Jan. 20, 1993, when Mr. Clinton first assumed it"); see also *infra* notes 5-21 and accompanying text (discussing pre-Clinton decisions of the Court that arguably weakened the presidency).

5. 418 U.S. 683 (1974).

branches.<sup>6</sup> Instead, the Court upheld a qualified executive privilege that required the federal courts to balance a president's need to maintain the confidentiality of certain communications or information against the needs or interests of the persons or institutions demanding disclosure.<sup>7</sup> The more specific and compelling a president's need to maintain confidentiality (such as to protect the lives of service people in combat), the more likely are his chances of being able to do so.

Second, the Supreme Court in *Morrison v. Olson*<sup>8</sup> upheld, with only a single dissent,<sup>9</sup> the constitutionality of the Independent Counsel Act.<sup>10</sup> The case did not involve an independent counsel's investigation of the president personally (and thus an independent counsel's direct interference with presidential activities).<sup>11</sup> Nevertheless, the Court held, *inter alia*, that the Act barred a president from removing at will an independent counsel, and that such a restriction was consistent with the separation of powers because it did not "unduly interfer[e]"<sup>12</sup> with a president's basic ability to discharge his unique constitutional functions.<sup>13</sup>

Third, the Court in *Nixon v. Fitzgerald*<sup>14</sup> upheld, 5-4, a president's absolute protection from damages liability for his official acts as chief executive.<sup>15</sup> The majority based its decision upon "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our

6. *Id.* at 713 ("[W]hen the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice.").

7. *Id.* ("Upon receiving a claim of privilege from the Chief Executive, it [is the] duty of the District Court to treat the subpoenaed material as presumptively privileged and to require the Special Prosecutor to demonstrate that the Presidential material was 'essential to the justice of the [pending criminal] case.'" (quoting *United States v. Burr*, 25 F. Cas. 187, 192 (C.C. Va. 1807) (No. 14,694))).

8. 487 U.S. 654 (1988).

9. Many regard Justice Scalia's dissent as one of the most prescient dissents ever filed. Justice Scalia criticized the majority for "fail[ing] to explain why it is not true that—as the text of the Constitution seems to require, as the Founders seemed to expect, and as our past cases have uniformly assumed—all purely executive power must be under the control of the President." *Id.* at 733-34 (Scalia, J., dissenting).

10. *Morrison*, 487 U.S. at 696-97. The independent counsel statute was first created under the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (1978) (codified as amended at 28 U.S.C. §§ 591-599 (1994)).

11. The parties investigated were employees of the Department of Justice. *Morrison*, 487 U.S. at 665-66.

12. *Id.* at 693.

13. *Id.* at 693-96.

14. 457 U.S. 731 (1982).

15. *Id.* at 757-58.

history.”<sup>16</sup> The Court cited many factors that weighed in favor of upholding this absolute immunity: the viability and influence of the presidency, which makes its occupant an easy and tempting target for civil lawsuits;<sup>17</sup> the importance of protecting a president’s judgment and energy from the distractions and pressure that potential damages liability would create;<sup>18</sup> and the availability of alternative checks on presidential activity, such as media scrutiny, congressional oversight, and the possibility of impeachment.<sup>19</sup> Given the diverse and open-ended nature of presidential duties, the majority added, the president’s absolute immunity cannot workably be limited to specific functions of his office, but instead must extend to all “acts within the ‘outer perimeter’ of his official responsibility.”<sup>20</sup>

The Court in *Nixon* reserved the question of whether a sitting president may be subject to civil lawsuits for his unofficial actions.<sup>21</sup> In 1997, however, the Court answered this question with a resounding “Yes.” In *Clinton v. Jones*,<sup>22</sup> the Court unanimously rejected any presidential immunity from civil actions that are based on the president’s unofficial conduct.<sup>23</sup> After the *Jones* decision, the specter arose that it, coupled with *Morrison* and *Nixon*, potentially placed the president in a vulnerable position when dealing with an independent counsel investigating him for allegedly unofficial or pre-presidential misconduct.

The concerns about a president’s vulnerability to distraction (or worse) as a result of civil damage actions based on his unofficial conduct only intensified after two more federal court decisions in 1998. In *In re Sealed Case*,<sup>24</sup> the United States Court of Appeals for the District of Columbia Circuit rejected the existence of any special “protective function privilege” that would have precluded Secret Service agents from being compelled to testify about possible presidential misconduct observed while performing their protective function in physi-

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16. *Id.* at 749.

17. *Id.* at 751-53.

18. *Id.* at 753-54.

19. *Id.* at 755-57.

20. *Id.* at 756.

21. *Id.* at 748 n.27 (“[O]ur holding today need only be that the President is absolutely immune from civil damages liability for his official acts in the absence of explicit affirmative action by Congress. We decide only this constitutional issue, which is necessary to disposition of the case before us.”).

22. 520 U.S. 681 (1997).

23. *Id.* at 705-06 (“We . . . hold that the doctrine of separation of powers does not require federal courts to stay all private actions against the President until he leaves office.”).

24. 148 F.3d 1073 (D.C. Cir. 1998) (per curiam).

cal proximity to the president.<sup>25</sup> In *In re Lindsey*,<sup>26</sup> another panel from the D.C. Circuit held that the Deputy White House Counsel, when called before a federal grand jury, could not refuse, on the basis of a government attorney-client privilege, to answer questions about a president's criminal misconduct, even if information about the misconduct was obtained in private communications with the president.<sup>27</sup>

To the extent that these decisions weakened the presidency vis-à-vis the other branches, conventional wisdom places the blame squarely on Bill Clinton. First, his failure to settle the *Jones* lawsuit allowed it to fester until it became a danger to him (and his presidency). Second, Clinton did not have to lie under oath about his relationship with Monica Lewinsky when he faced intense questioning about it in a deposition in the *Jones* case. If Clinton had told the truth, it is conceivable that he might have spared himself and the nation a great deal of grief (not to mention costly impeachment proceedings).<sup>28</sup> Third, Clinton's zeal to protect himself led him, in the view of many supporters of his impeachment and removal, to authorize several frivolous challenges to lawful inquiries from the Office of Independent Counsel.<sup>29</sup> These challenges arguably weakened the presidency. Clinton's conduct in the *Jones* case also led to an unprecedented disbarment proceeding against a sitting president<sup>30</sup> and a fine imposed by a federal district court for lying under oath.<sup>31</sup> If Clinton were to have come clean sooner, or were he not to have blocked the testimony of his aides and Secret Service agents (he could, for example, have voluntarily waived any applicable privilege), he could have

25. *Id.* at 1079.

26. 158 F.3d 1263 (D.C. Cir. 1998) (per curiam).

27. *Id.* at 1278.

28. See Quirk, *supra* note 2, at 123 (recognizing the argument that "[b]y the simple expedient of admitting the truth himself in the Jones deposition or at least after the Tripp tapes were revealed, Clinton could have prevented most of the disruption of the Lewinsky inquiry"). In the seven months between President Clinton's civil deposition in the *Jones* case and his grand jury appearance, he had been warned repeatedly to come clean. Consequently, it is only fair that he be held responsible for most of the fallout from his failure to heed this counsel.

29. See, e.g., *In re Lindsey*, 158 F.3d at 1278 (holding that an attorney in the Office of the President could not assert government attorney-client privilege to withhold from a grand jury information that related to possible criminal conduct); *In re Sealed Case*, 148 F.3d at 1079 (refusing to recognize a "protective function privilege" for Secret Service agents who, in response to a request from the OIC, attempted to withhold information concerning Clinton's relationship with Monica Lewinsky).

30. See Don Van Natta Jr., *Panel Advises That Clinton Be Disbarred: President Vows to Fight Penalty by Arkansas*, N.Y. TIMES, May 23, 2000, at A1.

31. See *Jones v. Clinton*, 36 F. Supp. 2d 1118, 1134 (E.D. Ark. 1999) ("The President shall pay plaintiff any reasonable expenses, including attorney's fees, caused by his willful failure to obey this Court's discovery Orders.").



preserved the opportunity for future presidents to have greater leverage in cutting deals with members of Congress or special prosecutors bent on questioning White House personnel about presidential misconduct.

The conventional wisdom about the likely consequences of the federal court decisions on executive privilege and immunity is overstated, however, for several reasons. First, it overlooks how most presidents protected themselves from intrusive questioning by the other branches prior to the *Nixon* decision (and, in many instances, after it). Most presidents traditionally protected themselves by bargaining with the members of Congress or the lawyers who were making the inquiries.<sup>32</sup> To be sure, recent court decisions provide those seeking information from a president with some leverage that they did not have before the 1970s—by backing up any threats to go to court with the likelihood of victory.<sup>33</sup> Nevertheless, court battles take time, and, in future bargaining sessions, presidents can take advantage of the prospect of protracted litigation.

Second, presidents can learn from the example of Calvin Coolidge that there are political and personal benefits to putting their integrity on the line when faced with charges of scandal. After succeeding to the presidency upon the death of Warren G. Harding, Coolidge inherited an administration riddled with rumors of scandal.<sup>34</sup> The rumors concerned leasing privileges to the government's Teapot Dome oil reserve in Wyoming and Elk Hills oil reserve in California.<sup>35</sup> Coolidge seized the initiative. He nominated two special prosecutors, whom he asked the Senate to confirm.<sup>36</sup> He charged the prosecutors to handle all litigation associated with the scandal.<sup>37</sup> His timing was impeccable, for the Senate was on the verge of taking more

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32. See, e.g., Katy J. Harriger, *Independent Justice: The Federal Special Prosecutor in American Politics* 13-39 (1992) (reviewing how presidents responded to investigations by special prosecutors prior to the passage of the Ethics in Government Act of 1978); Jonathan Turley, *Paradise Lost: The Clinton Administration and the Erosion of Executive Privilege*, 60 MD. L. REV. 205, 224 (2001) (explaining that "past White House counsels have long preferred to leave questions of privilege unresolved and to operate within the ambiguity of executive privilege to negotiate compromises with Congress or the judiciary").

33. See *supra* notes 4-27 and accompanying text (discussing recent cases that have limited the special privileges and immunities available to presidents).

34. Donald C. Smaltz, *The Independent Counsel: A View from Inside*, 86 GEO. L.J. 2307, 2314 (1998).

35. *Id.* at 2315.

36. *Id.*

37. *Id.*

extreme action.<sup>38</sup> His appointees, Owen Roberts (a Republican, whom Herbert Hoover subsequently appointed to the Supreme Court) and Atlee Pomerene (a former senator from Ohio), were perfect because they had the professional expertise necessary to conduct an investigation that was neither a whitewash nor a flurry of vindictiveness.<sup>39</sup> Indeed, the investigation proved to be exemplary. Because of their work, Secretary of the Interior Albert Fall was convicted for taking bribes and became the first cabinet member sent to prison for misconduct in office;<sup>40</sup> the oil magnate Harry Sinclair was found guilty of contempt of court;<sup>41</sup> and Attorney General Harry Daugherty was eventually fired and later indicted and convicted.<sup>42</sup> The investigations further revealed that Democrats as well as Republicans had been involved in the scandal.<sup>43</sup> But Coolidge was never touched by the investigations. He rose above them, appeared to be courageous in welcoming them, and was handily reelected as president in 1924.<sup>44</sup>

Today, it appears more difficult for a president to do what Coolidge did, in part because his enemies will have greater access to the media to make charges of or insinuations about his guilt. Even so, a president has access to the same media, and his access to the bully pulpit allows him unique opportunities to put such outlandish charges to shame.

Moreover, running from, rather than standing tall in the face of, charges of misconduct (even to protect one's own hide) is counterproductive. The system that preceded the ill-fated independent counsel law provided a strong disincentive for a president to attack or obstruct a special prosecutor. In the previous system, the special prosecutor would have been appointed by the president's own attor-

38. See *id.* (observing that prior to President Coolidge's proposal, "the hearings had a decidedly partisan tone," and that "the Democrats were pushing forward to expose and embarrass the Republicans").

39. See HARRIGER, *supra* note 32, at 14 (noting that Roberts and Pomerene "had regular contact with the White House, the Senate committee investigating the scandal, [and] the Department of Justice, . . . [and] in most cases these relationships were congenial and characterized by cooperation").

40. Smaltz, *supra* note 34, at 2316.

41. ROBERT K. MURRAY, *THE HARDING ERA: WARREN G. HARDING AND HIS ADMINISTRATION* 472 (1969). Sinclair was found guilty for contempt of court for tampering with the jury that initially acquitted him in a criminal matter related to the scandal. *Id.*

42. Smaltz, *supra* note 34, at 2316.

43. See *id.* at 2315 (explaining that one individual who confessed to being involved in the scandal "admitted giving gratuities to several Democrats, including Warren William G. McAdoo, who was then considered the frontrunner for the Democratic Presidential nomination").

44. See MURRAY, *supra* note 41, at 511 ("Of the 28,647,000 votes cast, Coolidge received 15,275,000 or 54 percent in a three-way race, a phenomenal showing.").

ney general, and thus any attack or obstruction by the president would appear to be an admission of guilt. Such was the case when President Nixon fired Archibald Cox—a decision that plainly backfired against Nixon.<sup>45</sup> Firing Cox only made Nixon look guilty. The prospect of such backfiring has left most other special prosecutors who have been appointed by presidents or attorneys general immune to a president's public attacks, stonewalling, or retaliation.<sup>46</sup>

Also, it is important to recall that the Supreme Court based its ruling in the *Jones* case on the expectation that the district court judge would manage discovery to avoid undue interference with the president's duties.<sup>47</sup> Yet the district judge failed to do so. At a minimum, she could have dismissed the case without discovery once she decided that Jones had not suffered a sufficiently serious injury to support a cause of action for sexual harassment.<sup>48</sup> She also could have disallowed questioning of the President about Monica Lewinsky, or she could have encouraged or ordered Jones's lawyers to ask more direct questions of the President.

Too much should not be made out of the seemingly revolutionary character of recent federal court rulings on executive privilege and immunity. Prior to *Jones*, the *Nixon* decision had generally not been treated as an odd or especially harmful case in large part because the Court recognized for the first time that a president was entitled to some executive privilege.<sup>49</sup> Moreover, the Court noted in *Jones* that the Supreme Court in *Nixon* and Chief Justice Marshall in *United States v. Burr*<sup>50</sup> upheld the principle that "the President is subject to

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45. See Smaltz, *supra* note 34, at 2319 (discussing the public outrage that attended President Nixon's firing of Special Prosecutor Archibald Cox).

46. Six presidents appointed eleven special prosecutors from 1875 until Archibald Cox's appointment in 1973. *Id.* at 2311. Of these eleven, two were fired. One was fired by President Grant in 1875 because the special prosecutor had planned on investigating a long-time friend of the President (lending further credence to the commonly-held perception at that time, and ever after, of widespread corruption in the Grant administration). See *id.* at 2311-12. The second special prosecutor was fired in 1952 by President Truman's Attorney General, J. Howard McGrath, because the special prosecutor demanded unlimited access to McGrath's official and personal records. *Id.* at 2316-17.

47. See *Clinton v. Jones*, 520 U.S. 681, 707 (1997) ("The high respect that is owed to the office of the Chief Executive, though not justifying a rule of categorical immunity, is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.").

48. See RICHARD POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 228 (1999) (noting that "the judge [could have] dismissed Paula Jones's suit . . . without requiring the President to submit to being deposed").

49. See *supra* notes 5-7 and accompanying text (discussing the Court's treatment of executive privilege in *United States v. Nixon*, 418 U.S. 683 (1974)).

50. 25 F. Cas. 30 (C.C. Va. 1807) (No. 14,692d).

judicial process in appropriate circumstances.”<sup>51</sup> The *Jones* Court further noted that sitting presidents, including Presidents Monroe, Nixon, Ford, and Clinton, “have responded to court orders to provide testimony and other information with sufficient frequency that such interactions between the Judicial and Executive Branches can scarcely be thought a novelty.”<sup>52</sup> If there is no normative principle supporting a president’s use of his office as a shield to block legal process in a case challenging his actions as president, then it is hard to see why there should be such a principle in a case challenging unofficial conduct.<sup>53</sup> The fact that the subject matter of *Jones* involved sex does not constitute a justifiable basis for distinguishing it from these other precedents or for adopting a special constitutional rule. That fact is relevant as a basis for a trial judge to maintain tight control over discovery.

## II. IMPEACHMENT POST-CLINTON

In this Part, I examine the likely consequences of the Clinton impeachment proceedings for impeachment itself. Three possible consequences are especially noteworthy. First, I consider the degree to which the Clinton impeachment proceedings will likely strengthen the presidency vis-à-vis Congress. Second, I consider the extent to which the Clinton impeachment proceedings might help explain whether there are (or should be) different standards for impeaching presidents and judges. Third, I consider the degree to which the Clin-

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51. *Jones*, 520 U.S. at 703-04; see *Nixon*, 418 U.S. at 706 (“[N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.”); *Burr*, 25 F. Cas. at 32-33 (recognizing that a subpoena duces tecum could be directed to the president).

52. *Jones*, 520 U.S. at 704. Justice Stevens, writing for the majority, here referred to President Monroe responding to written interrogatories; President Nixon producing tapes, as ordered by the Court in *Nixon*; President Ford being deposed for *United States v. Fromme*, 405 F. Supp. 578 (E.D. Cal. 1975); and President Clinton testifying on videotape for *United States v. McDougal*, 934 F. Supp. 296 (E.D. Ark. 1996). *Jones*, 520 U.S. at 704-05.

53. Cf. *Jones*, 520 U.S. at 705 (“If the Judiciary may severely burden the Executive Branch by reviewing the legality of the President’s official conduct, and if it may direct appropriate process to the President himself, it must follow that the federal courts have power to determine the legality of his unofficial conduct.”). Ironically, the outcome of the Senate impeachment trial parallels the reasoning in the *Jones* case. The Court decided to allow Jones’s lawsuit to go forward precisely because it did not directly involve a challenge to the President’s exercise of his official duties, *id.* at 692-95, while the Senate acquitted Clinton in part because his misconduct lacked a sufficiently public dimension or harm. See *infra* note 57 and accompanying text (citing explanatory statements of some of the senators who voted to acquit President Clinton).

ton proceedings underscore the lack of utility of impeachment in the age of the Internet and the twenty-four-hour news cycle.

A. *Bill Clinton's Acquittal as Strengthening the Presidency*<sup>54</sup>

One significant issue posed by Bill Clinton's impeachment proceedings is whether his acquittal will weaken the presidency. During the proceedings, there was considerable speculation (mostly by the president's defenders) that the impeachment process would harm the presidency itself. To the contrary, the outcome of the proceedings is likely to make future congresses hesitate before attempting to impeach a president for predominately private misconduct of the same order or magnitude as committed by Clinton.

To understand how Congress will likely reach this conclusion one needs to consider how the institution itself will construe the significance of its acquittal of the President. This is not an insoluble task. It is typical for members of Congress to try to legitimize the outcome of an impeachment trial (or any legislative process, for that matter) by reconciling it with the outcomes of prior proceedings. This reconciliation is likely to work to the advantage of the presidency.

For example, precedent suggests that Congress will recognize a presidential zone of privacy so that a president's private life is largely immune to scrutiny in the federal impeachment process. Richard Nixon beyond doubt would have been impeached and removed for his abuses of uniquely presidential trusts, which had a public dimension,<sup>55</sup> but not for his income tax fraud, which was purely private.<sup>56</sup> Similarly, most senators who voted to acquit President Clinton explained that they did not perceive his misconduct as having a suffi-

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54. This discussion and the discussion in sections II.B and III.A are taken, in large part, from a book review I recently wrote for the *University of Chicago Law Review*. Michael J. Gerhardt, *The Perils of Presidential Impeachment*, 67 U. CHI. L. REV. 293, 300-05 (2000).

55. No member of Congress during the Clinton impeachment proceedings questioned the propriety of the impeachment attempt against President Nixon. It has come to stand as a paradigm of a legitimate presidential impeachment. See *Background and History of Impeachment: Hearing Before the Subcomm. on the Const. of the House Comm. on the Judiciary*, 105th Cong. 45 (1998) [hereinafter *Hearing on the Background and History of Impeachment*] (testimony of Michael J. Gerhardt, Professor of Law, College of William & Mary School of Law) (asserting that "[i]n the popular and scholarly mind, Nixon's impeachment represents the appropriate use of the impeachment process to address true abuse of power or the use of presidential power abusively").

56. See *Impeachment Inquiry: William Jefferson Clinton, President of the United States, Presentation on Behalf of the President: Hearing Before the House Comm. on the Judiciary*, 105th Cong. 125, 131-32 (1998) (statements of Robert J. Drinan and Wayne Owen, members of House Judiciary Committee during Nixon's impeachment proceedings) (explaining that Nixon's tax evasion was not impeachable because it was personal rather than official misconduct).

ciently public dimension or injury to warrant removal from office.<sup>57</sup> This decision, coupled with Clinton's acquittal, likely signals that there is a zone of the president's private life that will be treated as largely off-limits in the federal impeachment process.

Members of Congress will also likely recognize that any impeachment inquiry into the deeds of a popular president or an inquiry without strong public support must be kept very short. When faced with an investigation that might not uncover serious misconduct (insofar as the public is concerned) for some time, future members of Congress might think twice before beginning such a prolonged investigation for fear that it might alienate the public. Consequently, it is possible that impeachment will be effective, if at all, only for the kinds of misconduct that can galvanize the public to set aside its approval of a president's performance and support resignation or formal removal. Future members of Congress might support removal only if they have direct evidence of very serious wrongdoing and unambiguous consensus (in Congress and among the public) on the gravity of such wrongdoing.<sup>58</sup>

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57. Of the thirty-eight senators who published statements on their reasons for voting not guilty on both articles, more than half—twenty-six—explained that they did not regard the misconduct alleged in either article of impeachment approved by the House as constituting an impeachable offense. See 145 CONG. REC. S1576-78 (daily ed. Feb. 12, 1999) (statement of Sen. Akaka); *id.* at S1476-95 (statement of Sen. Biden); *id.* at S1511-12 (statement of Sen. Boxer); *id.* at S1500-01 (statement of Sen. Breaux); *id.* at S1608-10 (statement of Sen. Bryan); *id.* at S1524 (statement of Sen. Clelend); *id.* at S1568-69 (statement of Sen. Collins); *id.* at S1618-20 (statement of Sen. Dorgan); *id.* at S1530-32 (statement of Sen. Durbin); *id.* at S1560-61 (statement of Sen. Graham); *id.* at S1627-28 (statement of Sen. Hollings); *id.* at S1594-97 (statement of Sen. Jeffords); *id.* at S1474-75 (statement of Sen. Johnson); *id.* at S1566-68 (statement of Sen. Kennedy); *id.* at S1620-22 (statement of Sen. Kerry); *id.* at S1547-48 (statement of Sen. Kohl); *id.* at S1578-79 (statement of Sen. Leahy); *id.* at S1543-46 (statement of Sen. Levin); *id.* at S1600-05 (statement of Sen. Lieberman); *id.* at S1625-26 (statement of Sen. Lincoln); *id.* at S1498-99 (statement of Sen. Mikulski); *id.* at S1559-60 (statement of Sen. Moynihan); *id.* at S1574-75 (statement of Sen. Reid); *id.* at S1502-04 (statement of Sen. Sarbanes); *id.* at S1669-71 (statement of Sen. Snowe); *id.* at S1597-98 (statement of Sen. Wellstone).

58. Whereas President Clinton's acquittal might make it more difficult for Congress to use impeachment against a popular president, it underscores the greater vulnerability to impeachment and removal for those officials who lack a president's resources, such as recourse to the bully pulpit, or popularity. It is hardly inconceivable that an unpopular president such as Andrew Johnson might meet a different fate in an age in which the media constantly applies pressure to investigate a president's misconduct (or actions that have made him unpopular) and in which daily polls can dramatize a loss of popularity and an increase in support for removal. In these circumstances, removal or resignation might be extremely likely. To date, the only instance like this occurred during the final days of Richard Nixon's presidency, when the public, for the first and only time during the Watergate investigation, expressed support for the President's ouster based on information revealed on the Watergate tapes. See STANLEY I. KUTLER, *THE WARS OF WATERGATE* 531 (1990) (citing poll results that "showed public opinion favoring impeachment 66-27 percent" and

Finally, independent of whatever reconciliation Congress may reach, Clinton's acquittal will likely be construed as casting doubt upon the House's judgment to impeach the President. This may help wash away any deleterious effects the impeachment might have had on the presidency. The most notorious acquittals in the nineteenth century, namely those of President Andrew Johnson and Justice Samuel Chase, have each had the effect of dissuading subsequent congresses from initiating impeachments based on similar misconduct. The Clinton acquittal could be construed by subsequent congresses as rejecting the House's judgment on the impeachability of the President's misconduct.

The vote to impeach the President was (as it had been in Chase's and Johnson's cases) largely cast along partisan lines,<sup>59</sup> and there is widespread perception that the proceedings were conducted and resolved on partisan grounds.<sup>60</sup> Moreover, most people (including most members of Congress) largely agree about the underlying facts in President Clinton's case; they disagree primarily over the legal significance of those facts. Subsequent congresses can reasonably conclude that if such misconduct did not merit a conviction in President Clinton's case, it would be unfair or inconsistent to allow similar misbehavior to support a conviction.

### *B. The Standards for Impeaching Presidents and Judges*

A divisive constitutional issue in the Clinton impeachment proceedings was whether there are different constitutional standards for impeaching presidents and judges. This issue arose because one federal judge (Harry Claiborne) had been impeached and removed from office for having engaged in private misconduct unrelated to his office (tax evasion), while two others had been impeached and removed from office for having committed offenses like those with which Bill Clinton was charged (Walter Nixon for making false statements to a

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that "[p]ro-impeachment sentiment had risen 13 percent in one week"). This dynamic is likely to be even more problematic for a federal judge, including a Supreme Court justice, whose hearings are not likely to get anything near the widespread media coverage, the outpouring of public support, and the opposition to the prolongation of hearings that were present with the Clinton proceedings. In the absence of these factors, a federal judge or other low-profile official simply lacks the resources available to a president (particularly a popular one) in defending against political retaliation in the form of impeachment.

59. See 144 CONG. REC. H12,040-42 (daily ed. Dec. 19, 1998) (listing a member-by-member tally of the House vote on articles of impeachment).

60. See *Poll Update ABC Poll: 71 % Say Impeach Vote Based on Partisan Politics*, HOTLINE (The American Political Network, Alexandria, Va.), Feb. 16, 1999.

grand jury and Alcee Hastings for perjury and bribery).<sup>61</sup> If the standards were the same for impeaching presidents and judges, the case for President Clinton's removal would have been stronger.

The strongest argument for applying different standards for impeaching presidents and judges is that impeaching a president is more likely to destabilize the executive branch than impeaching a judge would the judicial branch. Because all judicial power is not vested in or subject to the control of a single person, impeaching a judge, even a Supreme Court justice, does not have the potential to bring the entire judicial system to a halt. In contrast, the fact that the entire executive branch is under the control and supervision of a single individual, the president, creates a greater likelihood that impeaching him would paralyze or frustrate the operations of an entire branch. Hence, a higher or tougher standard for impeaching a president would be required than for impeaching a judge.

A significant problem with this argument is the fact that Clinton's impeachment proceedings did not come anywhere close to paralyzing the executive branch. For most of their duration, the impeachment proceedings did not deflect the President from doing his job.<sup>62</sup> To the extent that they did so, the ensuing paralysis was no different than the paralysis that invariably results from government divided by a Congress dominated by one party and a White House occupied by someone from the other. Congress exemplified this point by allowing the President to give his annual State of the Union address on the evening of the day on which the defense in his impeachment trial began.<sup>63</sup> In addition, the stock market reached unprecedented heights during the impeachment proceedings.<sup>64</sup> Last, but not least, most work in the executive branch is done by subordinates, rather than by the president,

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61. *Hearing on the Background and History of Impeachment*, *supra* note 55, at 53 (prepared statement of Michael J. Gerhardt, Professor of Law, The College of William and Mary).

62. See POSNER, *supra* note 48, at 149 ("There is no indication that President Clinton's affair with Monica Lewinsky, or even the first seven months or so of its legal and political aftermath, reduced the time that he devoted to his official duties or dangerously distracted him from them.").

63. See, e.g., Peter Baker, *Clinton Defense Blasts Evidence as Distorted; Lawyers Call Disputes 'Trivial'*, WASH. POST, Jan. 21, 1999, at A1.

64. See Ianthe Jeanne Dugan, *Nasdaq, S&P 500 Climb to Records; Analysts Hail Stock Market's Strength*, WASH. POST, Dec. 22, 1998, at C1 ("On Friday, in the face of impeachment . . . , blue-chip stocks rallied and the Nasdaq composite index set a new record."); James K. Glassman, *Four Golden Years and Going for More*, WASH. POST, Dec. 27, 1998, at H1 ("Bucking dire predictions about the effects of impeachment, declining earnings and sky-high price-to-earnings ratios, the stock market has risen for the past six sessions in a row and could return more than 30 percent in 1999.").



so it is not clear how much the incapacity of a president, for any reason, necessarily would cause the government to grind to a standstill.

A second argument for adopting different standards for impeaching presidents and judges is that partisan politics will play a bigger role in presidential impeachments than judicial ones because presidents are elected officials.<sup>65</sup> This argument ignores, however, the significance of the radically different resources available to presidents and judges for combating attempted impeachments. The President's impeachment proceedings dramatically illustrated how presidents can rally to their defenses political parties, interest groups, academicians, and, perhaps the most important of all, the American people. They can even exact special advantages for themselves such as having their lawyers present while they are being questioned before a grand jury.<sup>66</sup> Such power weighs against a president's need for a higher impeachment threshold. Indeed, federal judges who lack such resources need at least as high a standard as presidents for their impeachments as a means of protecting their otherwise fragile tenure.

Moreover, judges, though unelected, can be victims of politically charged reprisals. Consider the case of Judge Harold Baer. Shortly after Judge Baer had granted a motion to suppress based on his finding that federal agents had conducted an illegal search in a drug distribution case,<sup>67</sup> Bob Dole, who was then the Republican candidate for president, threatened the judge with impeachment,<sup>68</sup> while President Clinton, who had appointed Baer, indicated that he was considering asking the judge to resign.<sup>69</sup> Though several appellate judges from the Second Circuit denounced the threatened impeachment as a violation of the judge's constitutionally protected independence,<sup>70</sup> Judge Baer reversed himself,<sup>71</sup> giving rise to the suspicion that the external political pressures altered his decisionmaking.

Yet another argument for adopting higher thresholds for impeaching presidents than judges is that judges, not presidents, have a

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65. See POSNER, *supra* note 48, at 104.

66. *Id.* at 152.

67. *United States v. Bayless*, 913 F. Supp. 232, 243 (S.D.N.Y. 1996), *vacated on reconsideration*, 921 F. Supp. 211 (S.D.N.Y. 1996).

68. See Don Van Natta Jr., *Judges Defend a Colleague from Attacks*, N.Y. TIMES, Mar. 29, 1996, at B1 (reporting that "Senator Dole called for Judge Baer's impeachment [stating that] '[w]e don't need judges who try to find excuses for more criminal behavior'").

69. *Id.*

70. See *id.* (stating that the judges found these threats to be "an extraordinary intimidation" and that the attacks "do a grave disservice to the principle of an independent judiciary").

71. *United States v. Bayless*, 921 F. Supp. 211, 217 (S.D.N.Y. 1996).

duty to symbolize or personify the law.<sup>72</sup> Such a difference in duties, however, does not signify that the meaning of "high Crimes and Misdemeanors"<sup>73</sup> depends on whether a judge or president is being impeached. Instead, the constitutional standard for impeachment could be the same, with the difference in duties shaping the circumstances and context in which the uniform standard is applied.<sup>74</sup>

There are further arguments that cut against applying different standards for presidential and judicial impeachments. One is that the assertion is counter-historical. It conflicts with the framers' obvious intention to adopt the phrase "during good Behaviour"<sup>75</sup> to distinguish judicial tenure (life) from the tenure of elected officials (such as the president), rather than to establish the particular terms of judicial removal.<sup>76</sup> The argument that the Constitution establishes different standards for impeaching presidents and judges is a relatively new one in the annals of impeachment history. For instance, President Johnson never made such a claim, though his impeachment had been preceded by four judicial impeachments, including Associate Justice Samuel Chase's.<sup>77</sup>

Yet another argument supporting uniform impeachment standards derives from historical practices. Congress has never endorsed the proposition that there are different standards for impeaching presidents and judges. Indeed, though some members of Congress asserted the argument in the midst of the impeachment attempts against Justice William Douglas, President Nixon, and the three judges removed in the 1980s, neither the House nor the Senate ever took a vote on the question in any of those proceedings. Moreover, of the seventeen senators who expressed an opinion about this issue in the Clinton impeachment trial, eleven (ten Republicans and one

72. See POSNER, *supra* note 48, at 104 ("The judge symbolizes law and so even his relatively minor crimes gravely undermine the system of legal justice.").

73. U.S. CONST. art. II, § 4.

74. Similarly, the simple fact that the consequences that might ensue from an attempt to impeach a president might be different from those that would result from the removal of a judge is not an adequate basis for employing different constitutional standards for impeaching presidents and judges. Rather, the consequences of impeaching an official could be factors taken into account by Congress in the course of applying the same operative standard.

75. U.S. CONST. art. III, § 1.

76. See MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 83-86 (2d ed. 2000) (discussing the applicability of the "good behavior" clause to the impeachment process).

77. See *id.* at 183.

Democrat) took the position that the same standard applies for impeaching presidents and federal judges.<sup>78</sup>

The most plausible precedents for this point of view are the impeachment and removal of Judges John Pickering (for drunkenness and insanity)<sup>79</sup> and Harry Claiborne (for income tax evasion)<sup>80</sup> because each judge was removed for misconduct arguably unrelated to his official duties. Yet, neither precedent supports a looser standard for impeaching federal judges. In fact, John Pickering was impeached and removed because he could no longer function as a federal judge and because there was no other alternative for dealing with a judge who had, in the estimation of Congress, become completely dysfunctional.<sup>81</sup> This same reasoning led to the ouster of Harry Claiborne, as reflected in the House Report on his impeachment.<sup>82</sup> The latter indicates that a central concern of House members (who voted unanimously to impeach him) was that he had become completely disabled from functioning as a federal judge because of his criminal conduct and conviction.<sup>83</sup>

In the final analysis, the Clinton impeachment proceedings do not establish any firm precedent for analyzing judicial and presidential impeachments under different standards. The Clinton proceedings hardly produced any consensus on that question, nor do any of the other usual sources of decision, such as historical practices, settle the issue.

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78. See 145 CONG. REC. S1561-62 (daily ed. Feb. 12, 1999) (statement of Sen. Allard); *id.* at S1509 (statement of Sen. Bond); *id.* at S1605-08 (statement of Sen. Brownback); *id.* at S1517-21 (statement of Sen. Fitzgerald); *id.* at S1526-29 (statement of Sen. Frist); *id.* at S1462-65 (statement of Sen. Gorton); *id.* at S1499-1500 (statement of Sen. Grams); *id.* at S1504-05 (statement of Sen. Kerrey); *id.* at S1532-34 (statement of Sen. Kyl); *id.* at S1512-17 (statement of Sen. Mack); *id.* at S1562-66 (statement of Sen. McConnell). Some senators, however, supported different standards for impeaching presidents and judges. *Id.* at S1477 (statement of Sen. Biden); *id.* at S1620-22 (statement of Sen. Kerry); *id.* at S1547-48 (statement of Sen. Kohl); *id.* at S1509-11 (statement of Sen. Robb); *id.* at S1502-04 (statement of Sen. Sarbanes).

79. See *Hearing on the Background and History of Impeachment*, *supra* note 55, at 358 (setting forth the articles of impeachment against Judge Pickering).

80. See *id.* at 368 (setting forth the articles of impeachment against Judge Claiborne).

81. See GERHARDT, *supra* note 76, at 50-51 (discussing Judge Pickering's impeachment and removal).

82. H.R. REP. NO. 99-668, at 23 (1986).

83. *Id.* (asserting that Judge Claiborne's falsification of a tax return undermined public confidence in the judicial system and that "[s]uch a result render[ed] him unfit to continue to serve on the federal bench").

### C. *The Limited Utility of Impeachment in the Modern Age*

One commonly overlooked consequence of President Clinton's acquittal is that it is likely to underscore the lack of utility of impeachment as an effective weapon against serious presidential abuses of power. After Richard Nixon's forced resignation in the face of likely impeachment, only one other official faced with the threat of impeachment has resigned.<sup>84</sup> Otherwise, the threat and even the fact of impeachment have not forced any other officials to resign, including two who, prior to their impeachments, had been convicted and imprisoned.<sup>85</sup> Clinton himself, backed by popular support throughout his impeachment proceedings, ignored more than one hundred newspaper editorials calling upon him to resign.<sup>86</sup>

The threat of impeachment no longer seems to carry the stigma it once did. Federal judges, as demonstrated by Judges Claiborne and Nixon, can continue to receive their judicial salaries, regardless of their imprisonment, unless or until they have been formally removed from office.<sup>87</sup> Moreover, impeachable officials can expect congressional inertia against mobilizing impeachment proceedings. Members of Congress—now constantly in the public eye thanks to the twenty-four-hour news cycle—have little incentive to conduct im-

84. GERHARDT, *supra* note 76, at 204 n.36. The official in question was Robert Collins, a federal district judge, who was convicted for bribery, conspiracy, and obstruction of justice. *Id.* After his convictions were upheld, he was imprisoned. *Id.* While Collins was incarcerated and still receiving his judicial salary, the Judicial Conference of the United States formally certified to the House its conclusion that "Judge Collins has engaged in conduct which might constitute one or more grounds for impeachment." *Id.* (quoting *House Urged to Impeach Jailed Judge*, CHI. TRIB., June 24, 1993, at N8).

85. The two officials were Harry Claiborne (convicted of tax evasion), *see supra* note 80 and accompanying text, and Walter Nixon (convicted of making false statements to a grand jury), *see Hearing on the Background and History of Impeachment, supra* note 55, at 370 (enumerating the articles of impeachment against Judge Nixon). Both judges were convicted for their criminal offenses and were incarcerated, but were still receiving judicial salaries at the times of their respective impeachments. GERHARDT, *supra* note 76, at 88-89 (Claiborne); *Rodino Calls for Ouster of Convicted U.S. District Judge*, L.A. TIMES, Mar. 18, 1988, at 19 (Nixon).

86. *See, e.g.*, Editorial, *A Betrayed Trust: It Is Time, Mr. President, to Resign*, DENVER POST, Aug. 19, 1998, at B10; Editorial, *A Matter of Integrity: Clinton Should Resign*, USA TODAY, Sept. 14, 1998, at 18A; Editorial, *President Clinton Should Resign Now*, BOSTON HERALD, Dec. 21, 1998, at 34; Editorial, *Resign Now Mr. President*, WASH. TIMES, Dec. 14, 1998, at A18; Editorial, *Resignation the Only Responsible Option; Call for Courage. President Clinton Must Abandon His Instinct for Self-Preservation and Do What's Right*, ATLANTA J. & CONST., Sept. 13, 1998, at 6G.

87. *See* GERHARDT, *supra* note 76, at 91 ("Imprisoned judges retain their titles, salaries, pensions, benefits, and, most importantly, their ability to return to the bench with full authority to decide cases and controversies."); *see also* United States v. Claiborne, 765 F.2d 784, 788 (1985) (pointing out that throughout his trial, conviction, and appeal, Judge Claiborne "continue[d] to hold office as a United States district judge").

peachment proceedings if doing so means displacing time and resources from legislative matters of greater concern to their constituents. Nor is Congress sufficiently well equipped to conduct exhaustive investigations quickly; neither the media nor the public is likely to be very patient with protracted hearings—especially if the public consensus is that removal from office is not warranted. The longer a president can stretch out or hinder an investigation, the longer he has to demonstrate that his “misconduct” has not disabled him from doing his duties and that Congress is on a partisan witch-hunt. Regardless of whether one thinks Clinton should have been removed from office for the misconduct that was the subject of his impeachment proceedings, even before the hearings began, the public had reached a judgment that he had not done anything legitimately impeachable.<sup>88</sup> In Clinton’s case, House and Senate Republicans were never able, even with extraordinary press coverage, to shake the public’s impatience with the impeachment hearings or its lack of faith in their partisan origins.

The critical question is what might happen in the future if a sitting president does something that a majority of Americans and congressional leaders regard as a legitimate basis for his removal. In such circumstances, it is hard to imagine that a president would be able to remain in office for the duration of any impeachment proceedings. Once a president loses substantial support from both the public and leaders of Congress, he will face incredible pressures to resign.<sup>89</sup> While a stubborn leader might refuse to leave office voluntarily, stubbornness in the face of substantial public outcry is likely to intensify the pressure to resign rather than alleviate it. Under such circum-

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88. See Guy Gugliotta, *Impeachment Inquiry Discussed in House; Leaders Consider Logistics of Probe but Link Decision with Caveat on Stronger Evidence*, WASH. POST, Feb. 10, 1998, at A9 (reporting that “[t]he House leadership has quietly begun to consider the logistics of a possible impeachment inquiry against President Clinton,” but that “[a] Wall Street Journal/NBC News poll . . . showed [Clinton] with a towering 79 percent approval rating”); *id.* (citing a *Newsweek* poll that found that forty-nine percent of the public thought that “the president shouldn’t be impeached even if he told Lewinsky to lie about the alleged affair”); Richard Morin, *Approval of Congress Drops in Poll; Most Reject Probe; Clinton’s Rating Higher*, WASH. POST, Oct. 12, 1998, at A1 (discussing a *Washington Post* survey that found that “Clinton is more popular now than he was before Thursday’s House vote to begin impeachment proceedings” and that “67 percent [of Americans] say they approve of the job Clinton is doing as president”); Richard Morin, *Public Blames Clinton, Gives Record Support*, WASH. POST, Feb. 15, 1999, at A1 (reporting that “56 percent [of the public] said the Senate should ‘drop the [impeachment] case without censuring Clinton’”).

89. Cf. Abbe D. Lowell, *Impeachment Was Never the Objective*, NAT’L L.J., Jan. 17, 2000, at A19 (asserting that the congressional leaders’ demands for the president’s resignation in the face of impeachment carry little weight without the support of public opinion).

stances, a president would appear unrepentant and indifferent to the consequences of his misconduct.

Such was the case with Richard Nixon. The public resistance to his removal persisted throughout most of the duration of the congressional investigations into his involvement with the Watergate break-in and cover-up.<sup>90</sup> But once his guilt was established in the public's mind and in the minds of most congressional leaders, public opinion, for the first time, shifted against his remaining in office.<sup>91</sup> Nixon read the writing on the wall, and resigned.

Clinton's acquittal has demonstrated that public support for a president can outlast the formal impeachment process. Nixon's resignation—forced by the will of the public—demonstrated that where misconduct is widely viewed as legitimately impeachable, formal impeachment proceedings can be rendered obsolete by pressure from an impatient public that demands resignation. In the future, as the information age progresses even further, it is unlikely that the formal impeachment process will have much, if any, utility as a means to redress presidential misconduct where an informed public increasingly applies pressure to secure the same result as the formal impeachment process was originally designed to effect.

### III. IMPEACHMENT ALTERNATIVES POST-CLINTON

Aside from a forced resignation, there are four other possible alternatives to impeachment. Below, I consider the feasibility of each.

#### A. *Prosecuting a Sitting President*

Yet another issue that arose in the Clinton impeachment proceedings was whether a sitting president could be criminally indicted or prosecuted. If so, then it is conceivable that the president could be vulnerable to impeachment on the basis of incapacity because of imprisonment or distraction caused by the need to defend himself. If not, then one of two prospects could arise. The first would be the disturbing specter of a lawbreaking president remaining in office and awaiting punishment until after he leaves office. The other might be the increased pressure on Congress to expedite an impeachment to make it possible for a president to stand trial sooner rather than later.

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90. See KUTLER, *supra* note 58, at 380 (noting that in June 1973, sixty-two percent of Americans were opposed to forcing Nixon's resignation).

91. See *id.* at 531 (noting that by August 1974, public opinion had shifted dramatically and that sixty-six percent of the public favored impeachment).

The major argument for immunizing a sitting president from indictment or prosecution is the same as the best argument for having a higher threshold for impeaching presidents than for impeaching judges—that the proceedings would unduly paralyze the executive branch.<sup>92</sup> Prosecuting other high-ranking officials, such as Supreme Court justices or members of Congress, would not have the effect of paralyzing the operations of an entire branch. Indicting or prosecuting a president would, however, because the executive branch is unique in that a single person, the president, oversees its administration. The problem with this argument is that it is hard to imagine that such an indictment or prosecution would be any (or much) more debilitating than a presidential impeachment trial, which did not paralyze the executive branch in the case of President Clinton.

A second argument for barring indictment or prosecution of a sitting president is that a president has the constitutional means to frustrate prosecutorial efforts by pardoning himself.<sup>93</sup> If a president may pardon himself, then, it becomes practically impossible to ensure that a criminal indictment or prosecution of a president can ever be accomplished, at least as a practical matter.<sup>94</sup> It is true that the absence of any express constitutional prohibition against a president's authority to pardon himself supports the plausibility of such a situation arising. The Constitution, however, provides a significant check on such an abuse of power—the federal impeachment process. The presence of this check, in the circumstances described above, should operate as a strong disincentive to a president who is considering pardoning himself. Abuse of power was a common example of an impeachable offense given in the constitutional and ratifying conventions,<sup>95</sup> and it is hard to imagine a better example of such abuse than a president using his pardon power to avoid criminal accountability for his misconduct. Indeed, it is an example that several

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92. See, e.g., Akhil Reed Amar, *In Praise of Impeachment*, AM. LAW., Sept. 1998, at 92, 93 (arguing that "[s]uch a prosecution, even if unsuccessful, could effectively . . . incapacitate [a president] and thereby nullify a national election").

93. See POSNER, *supra* note 48, at 108 ("There is no case law on the question, of course, but it has generally been inferred from the breadth of the constitutional language that the president can indeed pardon himself . . . ." (citing Ken Gormley, *Impeachment and the Independent Counsel: A Dysfunctional Union*, 51 STAN. L. REV. 309, 323 (1993))).

94. See *id.* at 108 (stating that because "the President probably does have the power to pardon himself . . . the entire subject of criminally prosecuting Presidents is rather academic").

95. See, e.g., 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 65-66 (Max Farrand ed., 1966) (statement of James Madison) (discussing the need for impeachment to prevent against abuses of presidential power and trust).

framers and ratifiers cited to illustrate the scope of the impeachment power.<sup>96</sup>

### B. Censure

The Clinton impeachment proceedings provided the most prolonged public debate about the propriety of censure in American history. During the course of this debate, the arguments against censure were made very clear. First, impeachment is the only means by which the Constitution authorizes censure of a president.<sup>97</sup> Second, censure might constitute a bill of attainder,<sup>98</sup> which is a legislative attempt to punish an individual in the absence of a judicial trial.<sup>99</sup> Judge Richard Posner endorses the latter argument and is confident that a censure, coupled with a fine, would be punitive, and thus, an illegitimate bill of attainder.<sup>100</sup> He is also certain that "if punitive purpose is the test for whether a congressional enactment is a bill of attainder, then a resolution censuring President Clinton would have been a bill of attainder, for the only and the undeniable purpose would have been to punish him."<sup>101</sup>

These arguments do not, however, convincingly eliminate censure as a legitimate option for Congress to consider using in future cases of presidential misconduct. To begin with, the first argument rests on a mistaken premise—that impeachment is the only constitutionally authorized means for dealing with presidential misconduct. Impeachment has no bearing on what Congress may do with respect to misconduct that does not rise to the level of an impeachable offense; it is only relevant as the exclusive means for removing a president for *impeachable* misconduct. The impeachment power therefore

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96. See, e.g., 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 498 (Taylor & Maury eds., 2d ed., 1854) (statement of James Madison during the Virginia ratifying convention); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 95, at 550 (statement of Colonel Mason).

97. See U.S. CONST. art. II, § 4 ("The President . . . shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

98. See *id.* art. I, § 9, cl. 3 ("No Bill of Attainder . . . shall be passed.").

99. BLACK'S LAW DICTIONARY 127 (6th ed. 1990).

100. POSNER, *supra* note 48, at 191.

101. *Id.* at 192. Posner further explains that shaming the president by means of a censure could hurt him tangibly because "it would be like a blacklist; it would mark [the president] as a wrongdoer and might deprive him of certain employment opportunities, such as a university presidency." *Id.* Posner is also satisfied that censure is a poor substitute for impeachment, which operated in President Clinton's case as "an effective, powerful, and legitimate form of shaming penalty." *Id.* at 195.



sheds no light on the options for dealing with unimpeachable misconduct.

Moreover, the constitutional text seems to *allow* censure. Article I, section 3 provides that "Judgments in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States."<sup>102</sup> This text seems to leave open the possibility of sanctions less severe than removal, such as censure.

Also, by virtue of the First Amendment, the speech or debate clause,<sup>103</sup> and the mandate for each chamber to maintain a journal,<sup>104</sup> the Constitution clearly allows individual senators to record publicly their condemnation of a president's misconduct. If the senators may engage in such expression individually, it is hard to see why they may not do so collectively. There is also nothing in the Constitution that bars a senator from asking her colleagues to sign a document that castigates the president and then entering that document into the *Congressional Record*. A censure is the functional equivalent of this action. While one could object that censure might become either a politically futile act or overused to frustrate or harass a president (or some other official), these are prudential, nonconstitutional objections.<sup>105</sup> The calculation of whether a censure is constitutional is separate and distinct from whether it makes political sense to use it in any given case.

Finally, several presidents, including Presidents Jackson, Tyler, and Buchanan, have been censured in resolutions passed by the House or the Senate.<sup>106</sup> Even if one could argue that the House's impeachment of President Clinton somehow constitutes a precedent against censure, there are numerous other instances in which mem-

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102. U.S. CONST. art. I, § 3, cl. 7.

103. *Id.* § 6, cl. 1 ("The Senators and Representatives shall . . . be privileged from Arrest during . . . any speech or Debate in either House . . .").

104. The Constitution requires each chamber of Congress to "keep a Journal of its Proceedings." *Id.* § 5, cl. 3.

105. Prior to the House's vote to impeach President Clinton, Representative William Delahunt sought opinions regarding the constitutionality of censure from the nineteen constitutional scholars and historians who testified about the background and history of impeachment in the special hearing held by the House Subcommittee on the Constitution on November 9, 1999. See Letter from Rep. William D. Delahunt to Rep. Henry J. Hyde, Chair, House Comm. on the Judiciary (Dec. 4, 1998) (on file with author). Fourteen of the nineteen constitutional scholars indicated that they thought censure was constitutional. See Letter from Rep. William D. Delahunt & Frederick C. Boucher to Members of the U.S. House of Representatives (Dec. 15, 1998) (on file with author).

106. JACK MASKELL, CENSURE OF THE PRESIDENT BY CONGRESS 3-6 (Congressional Research Serv. No. 98-843 A, Sept. 29, 1998).

bers of Congress approved censure.<sup>107</sup> In terms of historical practices, there is much more evidence supporting, rather than foreclosing, censure as a means by which to address presidential misconduct, particularly misconduct that does not rise to the level of "Treason, Bribery, or other high Crimes and Misdemeanors."<sup>108</sup>

### C. *The Electoral Process*

During President Clinton's impeachment proceedings, his defenders argued that one forum in which he could have (perhaps even should have) been held accountable for his misconduct was the electoral process.<sup>109</sup> Had the 2000 presidential election ended in a clear-cut popular and electoral vote victory for either George W. Bush or Al Gore, it is possible that it could have been treated as a referendum (to some degree) on Bill Clinton. But it is much more likely than not that the disputed claim of the victor (for it will be disputed by the loser and his supporters) will make it difficult to read much significance into the election for purposes of clarifying Bill Clinton's legacy.

Consider the possible problems with any claim that the election constituted a referendum on the Clinton impeachment. If, for example, George W. Bush (the apparent winner when I wrote this piece) were to prevail, his supporters, if not he, would no doubt claim to some degree that his victory vindicates his campaign theme to restore "honor and dignity" to the presidency.<sup>110</sup> They might argue further that both Gore's reluctance to campaign with Bill Clinton at his side,<sup>111</sup> and his mistaken factual assertions in the debates,<sup>112</sup> amplified

107. See *id.*

108. U.S. CONST. art. II, § 4; see MASKELL, *supra* note 106, at 3-6.

109. Cf. Richard Morin & Claudia Deane, *Public Blames Clinton, Gives Record Support*, WASH. POST, Feb. 15, 1999, at A1 (discussing the possible impact the Clinton "scandals" might have on the 2000 elections).

110. On a number of occasions, Bush pledged to restore "honor and dignity" to the presidency. See, e.g., Howard Kurtz, *Candidates' Problem Is Finding One to Fix; Education, Health Care, Taxes, Values Stand in for Absent Economic Concerns*, WASH. POST, Dec. 16, 1999, at A2; Terry M. Neal, *Bush Will Hit Gore on Ethics; Governor's Team, RNC Plot Strategy*, WASH. POST, Mar. 11, 2000, at A6; Terry M. Neal & Edward Walsh, *Bush: Clinton's Character Not an Issue; In Interview, He Says Voters Draw Own Conclusions About His Pledges of 'Honor and Dignity'*, WASH. POST, Aug. 6, 2000, at A18.

111. See R. W. Apple Jr., *Democrats: The Overview; Gore, in Debut as a Presidential Nominee, Says 'I Stand Here Tonight as My Own Man'*, N.Y. TIMES, Aug. 18, 2000, at A1 (noting Gore's efforts to distance himself from President Clinton during his campaign for the presidency); David S. Broder, Editorial, *Gore's Clinton Dilemma*, WASH. POST, Oct. 24, 2000, at A27 (discussing Gore's decision to separate himself from Clinton during the presidential campaign).

112. See Ceci Connolly & Terry M. Neal, *Nominees Carry Debate Themes Back on Road; Bush Attacks Rival's Veracity as Gore Decries Negative Politics*, WASH. POST, Oct. 5, 2000, at A18 (reporting Bush's post-debate criticism of Vice President Gore's "purposeful distortion of

by their resonance with Clinton's disputed lack of integrity, could confirm or illustrate the impact of the so-called scandals of the Clinton presidency on the election. In other words, the fact that Gore lacked Clinton's warmth—or charisma, some would say—and did some things that reminded many people of why they disliked Clinton, cost Gore the support of many voters and, some would say, the election.

Of course there are many problems with these arguments. First, Gore won the popular vote.<sup>113</sup> Moreover, he has a credible claim that a majority of Florida voters intended to vote for him rather than Bush even if a critical portion of them failed to do so.<sup>114</sup> In addition, Gore's distancing himself from Clinton arguably reduced the degree to which Clinton (or his misconduct) was in any sense on the ballot. And, of course, Hillary Clinton's victory in her run for the Senate,<sup>115</sup> not to mention the seats gained by the Democrats in both the House and the Senate,<sup>116</sup> suggests that the effects of the so-called Clinton scandals of which she was often alleged to be a part, if not a principal, were quite limited.

If, however, Vice President Gore were to prevail (a highly unlikely scenario at the time I write this), the significance of the so-called Clinton scandals would be reduced even further. To be sure, such a result would mean, even in the disputed circumstances under which Gore would ascend to the presidency, that the Bush theme did not resonate to the extent his campaign had hoped and that the voters were not prepared to agree with the Republicans on the relevance of Gore's or

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[Governor Bush's] proposals"); Glenn Kessler, *Debaters' Messages: Not the Whole Truth; Misstatements and Omissions Abound*, WASH. POST, Oct. 18, 2000, at A15 (discussing the many misleading or mistaken assertions made by each candidate during the presidential debates).

113. As of this writing, Gore led Bush in the national election results by over 350,000 votes. CNN.com Election 2000 Results, at <http://www.cnn.com/ELECTION/2000/results/> (visited Dec. 4, 2000).

114. See generally John Mintz & Dan Keating, *Fla. Ballot Spoilage Likelier for Blacks; Voting Machines, Confusion Cited*, WASH. POST, Dec. 3, 2000, at A1; Peter Slevin, *Absentee GOP Ballots; Democrat Alleges Unfair Application Corrections*, WASH. POST, Dec. 2, 2000, at A16; Roberto Suro, *Lawsuit Alleges Misconduct; Filing Says Gore Lost 4,000 Votes in 3 Counties*, WASH. POST, Nov. 28, 2000, at A1; Roberto Suro & Peter Slevin, *Gore Recount Request Argued in Florida Trial; Vice President's Experts Face Tough Questions*, WASH. POST, Dec. 3, 2000, at A1; Edward Walsh, *Gore Asserts He Won in Florida; Democrat Makes Case to Public as Bush Transition Moves Forward*, WASH. POST, Nov. 30, 2000, at A1.

115. Richard L. Berke, *Bush and Gore Vie for an Edge with Narrow Electoral Split; Hillary Clinton Goes to Senate; Florida Is Pivotal*, N.Y. TIMES, Nov. 8, 2000, at A1.

116. See Adam Clymer, *Bush Barely Ahead of Gore in Florida as Recount Holds Key to the Election; G.O.P. Retains Control, but Democrats Gain in Both Chambers*, N.Y. TIMES, Nov. 9, 2000, at A1 ("Democratic gains in the House and Senate on Tuesday fell short of control but produced the most narrowly divided Congress in almost half a century. Democrats gained at least three Senate seats and one or two in the House.").

Clinton's misconduct to the selection of a president. Moreover, a Gore victory would not necessarily be inconsistent with the public's desire to put the Clinton scandals behind them. For one thing, Gore's own campaign, especially after his bold choice of Senator Joseph Lieberman as his running mate,<sup>117</sup> signaled his desire to distance himself from Clinton's scandalous behavior. In addition, a Gore victory might signal the public's (continuing) impatience with efforts to capitalize politically—as was tried unsuccessfully in the impeachment process—on scandal-mongering.

The major problem with drawing these inferences from a Gore victory is that the victory will require or depend on a court decision to overturn certification of the Florida election in Bush's favor.<sup>118</sup> Although some could argue that it was scandalous for a Co-Chair of Bush's campaign in Florida, Katherine Harris, not to recuse herself from the process of certifying the election results for Bush, the rhetoric directed against her choices as secretary of state would be nothing compared to the vitriol and charges of scandal that Republicans would direct against Gore for having "stolen" the election from Bush.

Of course, if George W. Bush were to win the election, but the composition of the House and Senate were to change to benefit the Democrats (a development that seems likely at the time I write), a mixed signal would be sent. This scenario would support the view that many voters wanted to hold Bill Clinton and those closest to him accountable for the scandals associated with his administration. It would also indicate, however, that the voters did not associate such scandals with the Democratic Party itself. Moreover, this scenario would probably signal that many voters were not prepared to reward congressional Republicans for their leadership in steering the country through an impeachment ordeal.

#### D. "RIP"

Over the past few decades, politicians (and their allies) have increasingly used congressional hearings, criminal investigations, and judicial proceedings to thwart their opponents' campaigns and policymaking. Use of these methods has, at times, served as a substitute

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117. See Dan Balz & Ceci Connolly, 'We Will Make History Again'; Lieberman Will Help 'Tear Down a Mighty Wall of Division,' *Gore Says*, WASH. POST, Aug. 9, 2000, at A1 (reporting Gore's choice of Sen. Joseph Lieberman as his running mate).

118. See generally Dan Balz, *Florida Certifies Bush Winner; Gore Campaign Vows to Contest; Republican to Begin Transition*, WASH. POST, Nov. 27, 2000, at A1 (discussing the certification of the Florida election and Vice President Gore's plan to challenge that result); Roberto Suro & Jo Becker, *Gore's Fight Shifts to Courtroom*, WASH. POST, Nov. 27, 2000, at A1 (same).

for formal impeachment proceedings. In 1990, political scientists Benjamin Ginsberg and Martin Shefter dubbed this phenomenon "RIP"—standing for "revelation, investigation, and prosecution."<sup>119</sup> In their view:

electoral success often fails to confer the capacity to govern, and political forces have been able to exercise considerable power even if they lose at the polls or, indeed, do not compete in the electoral arena. As the twentieth century draws to a close, America is entering what might be called a post-electoral era in which RIP threatens to displace presidential elections.<sup>120</sup>

Watergate marked RIP's dramatic origins; it was the first time a political party coordinated criminal proceedings with congressional hearings to end a presidency.<sup>121</sup> RIP has affected every subsequent presidency.<sup>122</sup> For example, the Iran-Contra scandal, culminating in dramatic congressional hearings and eleven convictions, crippled President Reagan's final two years in office.<sup>123</sup> The investigation of the Iran-Contra scandal lasted throughout George Bush's single term as president, and one of the last things he did as president was, controversially, pardon two former Reagan officials, Casper Weinberger and Elliott Abrams, for their involvement in the affair.<sup>124</sup> Also, in 1994, Newt Gingrich predicted that a Republican Congress would use its subpoena power to humble the Clinton administration.<sup>125</sup> After Gingrich became House Speaker, Democrats triggered a House ethics inquiry culminating in fines against Gingrich for financial improprieties.<sup>126</sup> This was Democratic payback for Gingrich's use of similar tactics to force the resignations of Democratic Speaker Jim Wright and House Whip Tony Coelho in 1989.<sup>127</sup> President Clinton had many of

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119. BENJAMIN GINSBERG & MARTIN SHEFTER, *POLITICS BY OTHER MEANS: POLITICIANS, PROSECUTORS, AND THE PRESS FROM WATERGATE TO WHITEWATER* 39 (rev. ed. 1999).

120. *Id.* at 16.

121. *Id.* at 39-40.

122. For details on the rise and pervasiveness of RIP in relation to the presidency, see *id.* at 23-44.

123. See *id.* at 144-48 (discussing the Iran-Contra affair and its effects on the Reagan presidency).

124. See, e.g., Walter Pincus, *Bush Pardons Weinberger in Iran-Contra Affair; 5 Others Also Cleared; Angry Walsh Indicates a Focus on President*, WASH. POST, Dec. 25, 1992, at A1; David Johnston, *The Pardons; Bush Pardons 6 in Iran Affair, Aborting a Weinberger Trial; Prosecutor Assails 'Cover Up'*, N.Y. TIMES, Dec. 25, 1992, at A1.

125. See GINSBERG & SHEFTER, *supra* note 119, at 125 (noting Gingrich's plan to "launch legislative investigations to look into wrongdoing in the executive branch").

126. *Id.* at 28.

127. *Id.* at 62.

his initiatives impeded or deflected because of over one hundred congressional investigations<sup>128</sup> (some ongoing and some repeatedly on the same subjects),<sup>129</sup> court challenges by various partisan organizations,<sup>130</sup> and several independent counsel inquiries<sup>131</sup> that fostered not only Clinton's impeachment, but also considerable media speculation.

As an alternative method for controlling governmental conduct, RIP's costs have been enormous. First, it has consumed substantial government resources with little constructive outcome. Numerous congressional investigations into the Clinton administration have cost countless millions of dollars (the precise figures are unknown) and produced thousands of subpoenas (again, the precise numbers are unknown), but have yielded no improvements in our laws.<sup>132</sup> Politically driven investigations diminish the credibility of legitimate inquiries. Moreover, in the waning days of the Clinton administration, House leaders deployed their subpoena power to investigate Clinton's internal deliberations in formulating policy, often before those deliberations were finished. The focus of the subpoenas was Clinton's uni-

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128. See *id.* at 25 (explaining that "Republicans saw the never-ending investigative process as a means of harassing Clinton and preventing him from pursuing any serious legislative agenda"); Paul A. Gigot, *Scandal's Price: GOP Chops up Bill's Agenda*, WALL ST. J., May 1, 1998, at A14 (contending that because of the so-called scandals, Clinton could not advance his agenda past Republicans in Congress); cf. Chris Black, *A Rite of Non-Passage Comes to End for 105th Congress*, BOSTON GLOBE, Oct. 11, 1998, at A30 (noting a Democratic report that "found that 50 separate investigations of the Clinton administration were under way in the House alone").

129. Whitewater, to name but one example, was investigated on more than one occasion by different congressional committees. GINSBERG & SHEFTER, *supra* note 119, at 42.

130. The most obvious example is Judicial Watch, a conservative group that has sued the President and his administration on several occasions. See, e.g., Lorraine Adams & David A. Vise, *Report Clears First Lady and Others in FBI Files Case*, WASH. POST, Mar. 17, 2000, at A4 (noting Judicial Watch's assistance in filing a civil lawsuit against Clinton over FBI files on Republicans allegedly obtained by the Clinton White House); John F. Harris, *Clinton Defends Friend's Role in House Purchase*, WASH. POST, Oct. 1, 1999, at A19 (reporting that Judicial Watch sued the Clintons for accepting an allegedly illegal gift in connection with their purchase of a home in New York); John F. Harris & Lorraine Adams, *White House Is Probed on E-Mails; Justice Dept. Opens Criminal Investigation*, WASH. POST, Mar. 24, 2000, at A1 (noting the conservative group's involvement in a civil suit against the White House for allegedly mishandling e-mail correspondence).

131. See Louis Fisher, *The Independent Counsel Statute*, in THE CLINTON SCANDAL AND THE FUTURE OF AMERICAN GOVERNMENT 66-69, 75-76 (Mark J. Rozell & Clyde Wilcox eds., 2000) (discussing the Starr investigation and other independent counsel investigations of Clinton administration officials).

132. The precise figures of investigations and subpoenas are unknown for two reasons. First, neither the White House nor any congressional organization publishes information on the numbers of subpoenas issued or on investigations of executive misconduct. Second, the figures are difficult to compile, in part, because many investigations and many requests for data are informal.

lateral declaration of national monuments as a means to preserve certain federal land from being regulated.<sup>133</sup> Though Congress could have overridden the orders (because they were made pursuant to congressional delegations that either could have been withdrawn or displaced by law),<sup>134</sup> House leaders chose instead to impede administrative efficiency by forcing executive officials to squander time opposing the orders and to avoid maintaining written records of important meetings.

Second, RIP has encouraged voter apathy. As RIP has risen, the percentage of people voting in presidential elections has declined, and in 1996, voter turnout reached its lowest level since 1924.<sup>135</sup>

Third, RIP gets ratings. The proliferation of media outlets, including the twenty-four-hour news cycle and the Internet, have pressured news organizations to beat the competition by reporting unsupported gossip and speculating about possible misconduct.<sup>136</sup>

Fourth, RIP impedes political compromise. Its rise coincides with an unprecedented increase in the percentage of party-line congressional votes. Colleagues from opposing parties are unlikely to forget their personal contests in negotiating legislation.

Lastly, RIP damages reputations recklessly. Too many lawmakers and prosecutors, such as Robert Ray in his Travelgate report,<sup>137</sup> insinuate wrongdoing when nothing criminal has transpired. They treat the reluctance to be investigated as suspect. Why, they ask, would an innocent person refuse to be investigated? Such suspicions take their toll by sometimes hardening into assumptions about guilt.

Both the president and members of Congress have the means to limit these costs. First, the next president, who will oversee all federal prosecutions, can denounce RIP. He should take pains to ensure that prosecutions are based not on policy differences, but on credible and legitimate evidence of criminal wrongdoing. Second, the House should follow the Senate's (and its own pre-1995) practice of requir-

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133. See George Lardner Jr., *Subpoena Widens Finance Probe; Request for White House Papers Covers 25 Categories, Copy Shows*, WASH. POST, Aug. 15, 1997, at A4 (discussing the various reasons for the use of congressional subpoena power).

134. The president was delegated the power to declare national monuments under 16 U.S.C. § 431 (1994).

135. See GINSBERG & SHEFTER, *supra* note 119, at 18-22.

136. I explore this problem further in Part IV.

137. Though Ray decided not to bring criminal charges against President and Hillary Clinton for their involvement in the firings of several Travel Office employees, he suggested there was "substantial evidence" of wrongdoing on Mrs. Clinton's part. Charles Babington, *Cleared, With Questions; Ray Cites 'Substantial Evidence' First Lady Had Firings Role*, WASH. POST, June 23, 2000, at A18.

ing agreement between committee chairs and ranking minority members prior to issuing legislative subpoenas. When House leaders in 1995 empowered committee chairs, acting alone, to issue subpoenas, RIP flourished. Bipartisan agreement to investigate is essential to avoid abusive practices.

RIP also thrives on poor electoral turnout. As long as voter turnout is low, politicians owe their elections to relatively small, intense constituencies. Despite long lines at some polls for the 2000 presidential election, the national turnout was barely fifty percent of the electorate—the third-lowest in the past one-hundred years.<sup>138</sup> If core constituents are happy with RIP (and its associated costs), then elected leaders will likely maintain it. If, however, voter turnout increases, those elected will be beholden to larger constituencies, many of whom despise government-by-subpoena. If people can signal that they want their presidents and Congress to prioritize legislating wisely over endless partisan investigations, RIP can be contained. Otherwise, the process will continue as an alternative to impeachment.

#### IV. THE MEDIA AND THE CLINTON SCANDALS

The Clinton impeachment proceedings highlighted a disturbing trend in the media's coverage of controversial political events. They showed the media's increasing penchant to substitute speculation and scandal reportage for coverage of actual facts and figures.<sup>139</sup> A recent empirical study of the media's coverage of the Clinton impeachment proceedings revealed that a majority of the public thought that the media was biased in favor of the prosecution and that people "resented the media for continuing to bring [stories of the scandal] to them."<sup>140</sup> This resentment led much of the public to turn away from the media for guidance through the historic event of the President's

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138. On November 9, 2000, United Press International reported that "[d]espite packed polling places in battleground states, experts say voter turnout nationally Tuesday was no higher than the lackluster levels of other recent presidential elections." *Turnout Lackluster Again, Experts Say*, UNITED PRESS INT'L, Nov. 9, 2000. UPI explained that "[o]nly 50.7 percent of eligible voters cast ballots, compared with 49 percent in 1996 when President Clinton defeated Sen. Robert Dole and 50.1 percent in 1988 when then-Vice President George Bush beat Michael Dukakis." *Id.*

139. See BILL KOVACH & TOM ROSENSTIEL, *WARP SPEED: AMERICA IN THE AGE OF MIXED MEDIA 2* (1999) (explaining that in a "search to reclaim audience, the press has moved more toward sensationalism, entertainment, and opinion"); Jonathan Alter, *Just the Facts?*, WASH. MONTHLY, Jan./Feb. 1999, at 22 (book review) (criticizing news reporters for allowing opinions and snide assessments of motive to creep into what should be only factual news stories).

140. KOVACH & ROSENSTIEL, *supra* note 139, at 77.



impeachment.<sup>141</sup> This development is both good and bad. It is good in that it reflects a demise of the media's supposed ability to lead or shape public opinion; it flatly failed to do so in the Clinton impeachment proceedings. Instead, the public demonstrated its ability to cut through the morass of commentary dumped on it to find the data that it wanted or needed. Yet, it is not a good development for the media to be abdicating or risking its traditional function of informing the public about important news events.

The development of both the twenty-four-hour news cycle (primarily on cable) and the Internet has pressured the media to change its traditional techniques for gathering and reporting news. The expansions of these technologies, in the judgment of Richard C. Leone, President of The Century Foundation, have transformed "both the time scale and the standards for what is news. Together, these developments have blurred the line between mainstream news and unsupported gossip. They have made the sensational—however unsubstantiated—acceptable."<sup>142</sup>

Consider the fact that even by the time the sensationalist Starr Report was released on the Internet for the world to read, the transformation in news-gathering had already begun. Several important stories relating to Clinton's deceptiveness in his *Jones* deposition, and later in his grand jury testimony, were initially made public on the Internet. For example, late in the evening of the day on which the President was deposed in the *Jones* case, Matt Drudge, an infamous Internet gossip, beat the competition in reporting that the President had testified falsely in his deposition by denying a sexual relationship with Monica Lewinsky.<sup>143</sup> The focus of Drudge's "Report" was *Newsweek's* decision not to run a story about Clinton's relationship with Lewinsky.<sup>144</sup> Drudge's sources, though unnamed at the time, were Lucianne Goldberg and George Conway, who had given him the information that they had unsuccessfully sought to have *Newsweek* publish.<sup>145</sup> Drudge was also among the first to report (based again on information given to him by Goldberg) the existence of a semen-stained dress belonging to Lewinsky that could, by means of DNA testing, verify the existence of an illicit relationship between Lewinsky

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141. *Id.* at 77-78. As Kovach and Rosenstiel note, if the media continues to fragmentize and polarize viewers, "people will have less stake in using the media." *Id.* at 88.

142. Richard C. Leone, *Foreword* to BILL KOVACH & TOM ROSENSTIEL, *WARP SPEED: AMERICA IN THE AGE OF MIXED MEDIA*, at v, vi (1999).

143. KOVACH & ROSENSTIEL, *supra* note 139, at 11-12.

144. *Id.* For a reproduction of this report, see JEFFREY TOOBIN, *A VAST CONSPIRACY: THE REAL STORY OF THE SEX SCANDAL THAT NEARLY BROUGHT DOWN A PRESIDENT* 231 (1999).

145. TOOBIN, *supra* note 144, at 229-30.

and Clinton.<sup>146</sup> Although Drudge often reported sensational but ultimately erroneous material,<sup>147</sup> his reporting earned him a regular spot among the talking heads on the MSNBC and Fox television networks. His reporting was reliable often enough that he could not be easily ignored by the mainstream media.<sup>148</sup> The public could not turn its back on the *Drudge Report* either. One poll by the Pew Research Center for the People and the Press found that, more than ever, the public turned to Internet sites (such as Drudge's) as news sources during the Clinton-Lewinsky saga.<sup>149</sup>

The twenty-four-hour news cycle and the Internet pose several challenges to the mainstream media that are likely to persist well beyond the presidency of Bill Clinton. First, they present the possibility of constant news updates with deadlines that are anything but fixed. Like a wire service, news can be published on the Web at a moment's notice; unlike a wire service, however, smaller Web sites have comparatively little editorial supervision. This raises the risk that the operators of the latter will proliferate unreliable and erroneous data.

Second, the intensification of competition for reporting breaking news, brought about by the Internet, raises a serious question about whether the online version of a news story has the same standards of proof (or reliability) as the slower print version of the story. More than a few of the established elite media sources cut corners in order to compete with Drudge and others in reporting breaking news on the Clinton-Lewinsky drama. And more than a few established media sources were subsequently forced to retract stories or admit errors in their reports.<sup>150</sup>

146. See KOVACH & ROSENSTIEL, *supra* note 139, at 139-41 (detailing the chronology of stories about the infamous blue dress).

147. For instance, Drudge erroneously reported that evidence being gathered by the Independent Counsel would prove the existence of "hundreds" of other women, including White House staffers, with whom President Clinton had had inappropriate relationships. *Id.* at 29.

148. It is even more striking that in spite of the fact that Drudge's accuracy rate was sufficiently low to get him fired by Fox television, many still consider him the hero of the hour in breaking the Clinton-Lewinsky scandal.

149. The Pew Research Center for the People & the Press, *Event Driven News Audiences, Internet News Takes Off*, at [www.people-press.org/med98rpt.htm](http://www.people-press.org/med98rpt.htm) (last visited Sept. 7, 2000).

150. I offer only two of the more prominent examples of this problem. First, the *Wall Street Journal* posted on its Web site, before the paper had had a chance to verify the story, that a White House steward had told a federal grand jury that he had seen the President alone with Lewinsky (contradicting the President's testimony that he had never been "alone" with her). KOVACH & ROSENSTIEL, *supra* note 139, at 28. The next day the paper changed its report, clarifying that the steward had told Secret Service agents about an alleged encounter. *Id.* Ultimately, the Starr Report related no such testimony. Second, the *Dallas Morning News* reported on its Web site a story about an alleged Secret Service

Third, the Internet and the twenty-four-hour news cycle have pressured the media to increasingly substitute commentary or speculation for factual reporting in the absence of breaking news. To be sure, the public has complained loudly and consistently that actual news reporting increasingly has been sacrificed for inconsequential commentary. Nevertheless, the Internet and the twenty-four-hour news cycle have underscored the economic efficiency and popularity of using talking heads (pundits) to fill dead air until breaking news actually occurs. It is cheaper for a network to find a few "experts" to talk—or, more precisely, to comment and speculate—about a subject than to produce more costly investigative reports.<sup>151</sup> Talking heads, in effect, have become cheap entertainment.<sup>152</sup>

The inevitable question is what, if anything, can anyone, including the next president, do about these problems? Regulation is, of course, out of the question because the First Amendment broadly protects the media's approach to reporting news.<sup>153</sup> News organizations do, however, have the means to improve their own performances and restore the public's confidence in their professionalism. They need to declare publicly their respective standards and policies for gathering and reporting news. The public can then use these published standards and policies as bases for evaluating the media. Moreover, news organizations can monitor each other to determine how well or how poorly the competition is satisfying its own standards of professionalism.

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witness to an intimate encounter between Clinton and Lewinsky. *Id.* The paper reported the story before it was verified by conventional means; it was trying to beat the competition on the Web, in print, and on the air. *See id.* As soon as the story had been released on the Web, its veracity began to be questioned in other mainstream media, including sources such as *Nightline* and *Larry King Live*. *Id.* Before the night was over, the main source for the story called the *Morning News* to retract its statement, and the paper had to publish a retraction during the next news cycle. *Id.*

151. *See generally id.* at 59-76 (discussing the proliferation of punditry during the Lewinsky scandal).

152. One dramatic post-impeachment example of this phenomenon was the around-the-clock, nonstop discussion in the media after the plane crash of John F. Kennedy, Jr., even though it was several days before his death was actually confirmed and there was, in the interim, no additional "news" to report.

153. *See, e.g.,* FCC v. League of Women Voters of California, 468 U.S. 364, 378 (1983) ("Unlike common carriers, broadcasters are 'entitled under the First Amendment to exercise "the widest journalistic freedom consistent with their public duties."'") (quoting CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981), in turn quoting CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 110 (1973)).

## V. THE SCANDALS IN THE LEGAL ACADEMY

Over the past few decades, law professors have become increasingly visible as public intellectuals. Throughout the Clinton impeachment proceedings, law professors were especially visible as consultants, witnesses, commentators, advocates, and experts. Unfortunately, much of their commentary on and advocacy in the proceedings reflects a serious problem in legal academia. The dilemma is that there are no norms guiding or constraining legal academics' commentary on public controversies. This is particularly the case outside of traditional fora such as law reviews. In the absence of such norms, many law professors allowed themselves to be used by the media in ways that helped to denigrate constitutional discourse.<sup>154</sup>

For example, many professors who assumed public roles during the Clinton impeachment proceedings operated not as dispassionate educators interested in clarifying basic legal and constitutional issues for the public (or their students), but rather as advocates. They were advocates for themselves (in the quest, presumably, to gain notoriety), their own pet theories of the proceedings, or one side of the controversy.<sup>155</sup>

Also, many professors demonstrated a disturbing degree of certitude about their points of view. The exception, rather than the rule, was any acknowledgment of self-doubt or uncertainty about the issues. Regrettably, few professors emulated the humility and candor of the late Joseph Goldstein, a beloved Yale Law School professor. One of the nation's leading family law scholars, Goldstein was not afraid, when confronted with a novel question of family law, to acknowledge that he was unsure of the answer and would have to give the matter some thought.<sup>156</sup> Almost no one commenting on the Clinton impeachment proceedings ever seemed to have doubts of any kind, even

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154. See POSNER, *supra* note 48, at 230-40 (arguing that the academic legal community lacks methods for resolving disputes that would be consensus building and would result in more objective discourse); Neal Devins, *Bearing False Witness: The Clinton Impeachment and the Future of Academic Freedom*, 148 U. PA. L. REV. 165, 165 (1999) (arguing that "[w]hen academics join forces to send a purely political message, their reputation as truth-seekers will diminish and, with it, their credibility"); Neal Devins & John McGinnis, *Sign Them Up: They Rush to Join Legal Briefs, but Professors Often Don't Know What They're Talking About*, LEGAL TIMES, July 24, 2000, at 62 (discussing the penchant of law professors and historians to publicly take positions on legal issues about which they have no expertise).

155. A similar phenomenon regrettably arose, albeit more intensely, in the aftermath of the 2000 presidential election. More than a few professors who had never written on nor established themselves as experts on the electoral process for choosing presidents (or state election law) eagerly participated as pundits on network television.

156. I base this on conversations with several of Professor Goldstein's former students.

though many issues (such as the constitutionality of censure) were novel and had never been carefully considered previously.

In all likelihood, the certitude of many professors derives from another tendency of the profession—the tendency to gain stature or notoriety by putting forward dramatic, novel solutions. The more extreme or unconventional the view, the more likely it will attract attention. Consequently, almost no one with a role in the proceedings appeared to be acting as a moderate; the academic viewpoints expressed tended to the extreme. Tentativeness became a weakness, and it certainly received little or no attention.

A related problem is that many professors tended to formulate (and even modify) their extreme or dramatic opinions as the process unfolded. There is, of course, no problem with someone rethinking or changing his or her opinions. The problem was that professors sometimes expressed different opinions to different audiences. The result was that viewers or listeners were given different impressions depending on the timing or forum. Moreover, some scholars used the hearings as an opportunity to air previously unarticulated views on the Constitution only to revise, modify, or abandon those opinions later when no one was watching.<sup>157</sup>

In addition, many legal scholars professed to be acting neutrally or without a political, personal, or partisan agenda even though they were acting at the request of the President, his friends or allies, House members, senators, interest groups, or the President's foes. Without any norms constraining or pressuring law professors to disclose their allegiances, it became much easier for them to hide their attachments, biases, or political agendas. More than a few law professors risked their credibility and the credibility of their profession by not being

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157. Perhaps the most dramatic example of this phenomenon was Yale law professor Bruce Ackerman's arguments regarding the legitimacy of lame duck impeachments. Ackerman first raised his argument that anything done by a lame duck Congress—including an impeachment—was unconstitutional just before his dramatic appearance before the House Judiciary Committee. See Bruce Ackerman, *Lame Duck Impeachment? Not So Fast*, N.Y. TIMES, Dec. 8, 1998, at A27. In the interim between the House's impeachment of Clinton and the initiation of Clinton's trial in the Senate, Ackerman released a book on the topic in which he modified his views to the point of suggesting that lame duck impeachments might be technically constitutional, but not good policy. BRUCE ACKERMAN, *THE CASE AGAINST LAMEDUCK IMPEACHMENT* 7-16 (1999). Ackerman's dramatic constitutional arguments opposing lame duck impeachments were broadcast nationwide and covered by many prominent newspapers. See, e.g., Peter Baker, *White House Lays Ground for a Lame-Duck Defense*, WASH. POST, Dec. 9, 1998, at A20; David E. Rosenbaum, *Testing of a President: The Issues; Come January, House Vote May Not Matter*, N.Y. TIMES, Dec. 9, 1998, at A23; Kathy Kiely, *Tart-Tongued Enmity Dominates Impeachment Hearing*, USA TODAY, Dec. 9, 1998, at 6A; Michael Tackett, *Hardened Attitudes Resist Torrent of Words*, CHI. TRIB., Dec. 9, 1998, at N1. The revisions he made in his viewpoints, however, largely went unnoticed.

more forthcoming about their allegiances or preferences. In other words, law professors, at the very least, could have been (and should strive to be) much more candid publicly about their personal and political ties and about their professional limitations and credentials.

The development of norms to guide or constrain the public commentary (or activities, for that matter) of law professors is no mean feat. It will require professors to internalize standards of conduct. There are a number of practices that law faculties could adopt to cultivate such internalization, including faculty workshops on the appropriate standards for law professors' public commentary, or perhaps mini-symposia critiquing such public commentary. Faculties, as well as legal publications (including law reviews, the *National Law Journal*, and *Legal Times*), could adopt shaming penalties for law professors whose public advocacy or argumentation (to the degree one can call it that) falls below respectable or acceptable standards. To the extent that law reviews or other publications have encouraged or rewarded ad hominem arguments or intemperate rhetoric, they should reconsider their own standards of publication and refuse to print argumentation that lowers rather than enhances the quality of constitutional discourse.<sup>158</sup>

### CONCLUSION

I view the impending inauguration of the next president as a time to address several troubling ramifications of the Clinton impeachment proceedings. These include the increased use of congressional hearings to harass political opponents; the media's increasing tendency to be more interested in scandal, speculation, and commentary than in the straight reporting of facts and figures; the exposure of impeachment as a relatively antiquated, ineffective tool for addressing serious presidential misconduct; and law professors' proclivities to be advocates rather than dispassionate educators. Nothing that has happened

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158. One dramatic example of this problem is the embarrassing exchanges between Chief Judge Richard Posner and Ronald Dworkin over the proprieties of Posner's writing a book on the Clinton impeachment proceedings and Dworkin's review of the book in the *New York Review of Books*. See Neil A. Lewis, *Watching 2 Legal Minds Square Off Over Clinton*, N.Y. TIMES, Feb. 19, 2000, at B9 (citing Dworkin's statement that it was "injudicious" for Posner "to make such a public parade of his own politics" and Posner's statement that Dworkin "goes overboard when he has a pen in his hand"); Steven Lubet, *Ethics Clash of Two Giants*, NAT'L L.J., Apr. 3, 2000, at A22 (reporting Dworkin's objection that Judge Posner exceeded the proper bounds of a federal judge by writing a book that comments on impending judicial proceedings). The ad hominem attacks between Posner and Dworkin in these pieces were unworthy of either of these distinguished scholars. One of the lingering questions that their heated rhetoric raises is why scholars feel the need to vent so much of their personal conflict in public.

since the 2000 election gives me much confidence that *any* of these problems will be vanishing anytime soon.

There are no easy answers to any of these problems, and it is unreasonable to expect the next president, whoever he is, to resolve these dilemmas. Yet, a few initial steps in the right direction seem feasible. What all of these steps have in common is the need for the leaders of several institutions to take responsibility for their actions. To begin with, the president can take the lead in denouncing the criminalization of policy differences and accept (rather than deflect) the responsibility for investigating and rooting out scandal within his administration. At the very least, members of Congress should require committee chairs and ranking minority members of committees to agree before initiating investigations or issuing legislative subpoenas. Also, news organizations can be more open about their standards for publication or broadcast, and can make greater efforts to comply with those standards. And finally, those of us who teach law should be much more candid about our own allegiances, expertise, and agendas.

It might be naive to think that even these small steps can make any difference. But I think it would be more naive to believe that without them the next four years will be much less scandal-ridden for any of us.